

Maharaja Shree Umaid Mills Ltd. Vs. Union of India (Uoi) and ors.

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Court : Rajasthan

Decided On : May-07-1959

Reported in : AIR1960Raj92

Judge : K.L. Bapna, Actg. C.J. and; Jagat Narayan, J.

Acts : [Constitution of India](#) - Articles 14, 278, 291, 294, 295 and 306; [Contract Act, 1872](#) - Sections 56 and 197; Rajasthan Excise Duties Ordinance, 1949 - Sections 30; Finance Act, 1950 - Sections 11 and 13; Rajasthan Administration (Amendment) Ordinance, 1949 - Sections 8 and 9; [Evidence Act, 1872](#) - Sections 115; [Central Excise Act, 1944](#) - Sections 3; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 13, Rule 4

Appeal No. : First Appeal No. 10 of 1955

Appellant : Maharaja Shree Umaid Mills Ltd.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : G.C. Kasliwal, Adv. General and; Kan Singh, Deputy Govt. Adv., (for No. 2) and;

Advocate for Pet/Ap. : G.S. Pathak,; Chand Mal and; Sumer Chand, Adv.

Disposition : Appeal dismissed

Judgement :

Jagat Narayan, J.

1. This appeal arises out of a suit brought by the Maharaja Shri Umaid Mills Ltd., Pali, against the Union of India, the State of Rajasthan, the Collector of Central Excise, New Delhi and the Superintendent of Central Excise, Jodhpur, for various reliefs which was dismissed by the District Judge, Jodhpur, by his judgment dated 3-9-1954.

2. The facts which appear from the evidence on record are that the Government of Jodhpur was desirous that someone should set up a cloth mill at Pali and applications were invited from prospective promoters by public advertisement in pursuance of Council Resolution No. 1 dated 30-3-1931. The offer of Seth Magnee Ram Bangur was accepted by His Highness the Maharaja of Jodhpur. vide letter (Ex. 16) dated 22-4-1938. on terms and concessions contained in the enclosure to that letter. It was ordered that a formal agreement should be drawn up by Messrs. Crawford Bailey and Co. Solicitors of Bombay and the Public Works Minister was authorised to execute it on behalf of the Government of Jodhpur,

The terms and concessions demanded by Seth Mangee Ram Bangur and the extent to which they were granted are shown in this annexure. A formal agreement (Ex. 1) - was eventually entered into on 17-4-41 which is the basis of the present suit. It was executed by the Public Works Minister on behalf of His Highness the Maharaja of Jodhpur and by Shri Ragu Nath Dass Bangur on behalf of Maharaja Shri Umaid Mills Ltd., Pali. Under Clause 5 of the agreement monopoly was granted to the plaintiff for a period ending on 12-2-1982. It may at once be stated that this monopoly was terminated by His Highness on 2-2-49 by Council Resolution No. 40 and the plaintiff no longer challenges the validity of this termination. The reliefs which the plaintiff now seeks are based on Clause 6 of the agreement which runs as follows:

'The State will exempt or remit the following duties and royalties;

(a) State Import duty on materials imported in to the State for use in the construction of buildings and works on the said land.

(b) State Import duty on machinery, plant, equipment, electrical installation and fittings and on replacement of spare parts imported by the company for installation or use in the Mill premises, Ginning Factory or Press from time to time.

(c) State Import duty on cotton, wool, artificial silk and other raw materials and stores imported by the Company for consumption in the Mill premises, Ginning ' Factory or Press.

(d) State Export Duty on yarn, piecegoods both cotton and woollen or other articles manufactured by the company in the Mill premises and by-products thereof exported by the Company from the State territories.

(e) State or Federal Excise duty on goods manufactured in the mill premises. If any such duty has to be paid by the Company the State will refund the same wholly to the Company.

(f) State or Federal Income Tax or Super Tax or Surcharge or any other tax on income. If any such tax has to be paid by the company the State will refund the same wholly to the company.

(g) State royalties on clay, stone and kankar for use in the construction, repairs or maintenance of buildings Or other erections upon the said land'.

Under Clause 12 of the contract the plaintiff agreed to pay the State a royalty of 7J per cent on the net profits of the company in consideration of the concessions granted to it.

3. The above agreement was acted upon by the Jodhpur State so long as it remained in existence. No import or export duty or royalty on clay, stone and kankar was charged from the plaintiff although it was realised from other persons. Under Section 34 of the Marwar Customs Act, 1938, the Government of Jodhpur was empowered to levy excise duty on any specified goods produced or manufactured in Mar-war but no such duty was ever recovered from the plaintiff. There is no evidence on record to show whether any excise duty was actually levied by the Jodhpur State on any goods during its existence.

4. The Jodhpur State acceded to the Dominion of India in August 1947, and entered into a Covenant of integration with other Rulers for the formation of the United State of Rajasthan Article 6(2) of which provided as follows:

'The Ruler of each New Covenanting State shall not later than the seventh day of April 1949, make over the administration of his State to the Raj Pramukh; and thereupon:

(a) All rights, authority and jurisdiction belonging to the Ruler which appertain or are incidental to the Government of the Covenanting State shall vest in the United State and shall thereafter be exercisable only as provided by this Covenant or by the Constitution to be framed thereunder;

(b) all duties and obligations of the Ruler pertaining or incidental to the Government of the Covenanting State shall devolve on the United State and shall be discharged by it; and

(c) all the assets and liabilities of the Covenanting State shall be the assets and liabilities of the United State'.

The administration of the Jodhpur State was taken over by the United State of Rajasthan on 7-4-1949. On the same date the Rajasthan Administration Ordinance 1949 (Ordinance No. 1 of 1949) was promulgated by the Raj Pramukh, Section 3 of which provided for the continuance of all the laws in force in any covenanting State immediately before the commencement of this Ordinance in that State until altered, or repealed or amended by a competent Legislature or other competent authority. 'Law' was defined to mean any Act, Ordinance, regulation, rule, order or bye-law which having been made by a competent Legislature or other competent authority in a covenanting State has the force of law in that state.

5. Under the Instrument of Accession the Dominion of India was debarred from imposing or realising any tax or duty in the territories of the United State of Rajasthan. On 19-9-49 the Rajasthan Excise Duties Ordinance 1949 (Ordinance No. 25 of 1949) was promulgated by the Raj Pramukh, under Section 3 of which excise duties became payable retrospectively on cloth manufactured in Rajasthan whether in stock on the first day of April 1949 or thereafter manufactured, at rates set forth in the First Schedule.

6. On 25-1-50 the United State of Rajasthan adopted the [Constitution of India](#) and became the Part B State of Rajasthan. Excise duties under the Ordinance however continued to remain payable to the State by virtue of Article 277 of the Constitution till provision to the contrary was made by Parliament.

7. The Indian States Finances Enquiry Committee was appointed by the Government of India by means of a resolution dated 22-10-48. Its report was signed on 22-7-1949 and was thereafter submitted to the Government of India. Its recommendations were accepted by the President of India and the Raj Pramukh of Rajasthan who entered into an agreement (Ex. 77) on 25-2-50, in accordance with the provisions contained in Articles 278, 291, 295 and 306 of the Constitution. In pursuance of the agreement the Central Excises and Salt Act, 1944, was extended to Rajasthan under Section 11 of the Finance Act, 1950 and the Rajasthan Excise Duties Ordinance, 1949 was repealed under Section 13. The Union Government started recovering excise duty from the

plaintiff with effect from 1-4-1950 under duress under the Central Excises and Salt Act, 1944 and realised a sum of Rs. 4,05,014/12/- as excise duty for the period from 1-4-1950 to 30-3-1952.

8. The case of the plaintiff is that the contract entered into by it with the Jodhpur State on 17-4-41 is binding on its successors namely the United State of Rajasthan, the State of Rajasthan and the Union of India and that under the terms of the agreement the plaintiff should either be exempted from payment of excise duty or the excise duty paid by it should be reimbursed under the indemnity Clause contained in the agreement. The trial court held that the agreement was not binding on the United State of Rajasthan or on the State of Rajasthan or on the Union of India and dismissed the suit.

9. The agreement dated 17-4-41 was admitted in the written statement on behalf of the State of Rajasthan. The Union of India denied knowledge of it in the written statement. Shri Kan Singh, who was then Assistant Government Advocate, represented all the four defendants in the trial court. Shri Chand Mal, counsel for the plaintiff served a notice on Shri Kan Singh, as representing the 4 defendants, asking him to admit a number of documents (paper C8/1 dated 2-12-52). Shri Kan Singh admitted them. The court exhibited them by its order dated 27-4-53 which was passed in the presence of Shri Than Chand who represented defendants 1, 3 and 4 in addition to Shri Kan Singh at that time. No objection was taken by Shri Than Chand to exhibiting these documents when that order was passed.

Shri Than Chand argued before us that Shri Kan Singh 'admitted the documents only on behalf of defendant No. 2 and they were wrongly treated as proved against defendants 1, 3 and 4 by the trial court. It is now too late for him to raise this objection. The proper stage for such an objection was on 27-4-53 when the court admitted them in evidence in his presence. It was held in *Gopal Das v. Sri Thakurji*, AIR 1943 PC 83 (87) that an objection to the mode of proof of a document (as distinguished from its admissibility) must be taken at the trial before the document is marked as an exhibit and admitted to the record. We accordingly hold that agreement Ex. 1 as well as the other documents referred to in the order of the court dated 27-4-53 had been rightly taken to have been proved.

10. It was not disputed before us that the agreement was acted upon by the State of Jodhpur so long as it lasted. In the trial court the plaintiff relied on Article 6(2) of the Covenant also in asserting that the agreement is binding on the successor State namely the United State of Rajasthan. That stand was given up when the case was argued in this Court in view of the decision of their Lordships of the Supreme Court in *Dalmia Dadri Cement Co. Ltd. v. Union of India*, AIR 1958 SC 816. It was contended that the agreement was acted upon by the United State of Rajasthan as well as by the State of Rajasthan and that this conduct amounted to affirmation of the agreement and consequently it is binding on the successor States.

11. In para 6 of the plaint it was alleged that the contract was acted upon by the successors of Jodhpur State. This allegation was denied both by the Union of India as well as by the State of Rajasthan. The finding of the learned District Judge was that it was not so acted upon by the successors of the Jodhpur State. This finding was challenged.

12. The evidence on record shows that the Director of Industries of the United State

of Rajasthan whose office was situated at Jodhpur during the continuance of that State continued to recover royalty under the agreement from the plaintiff. He made demands for the payment of royalty not only for the period since the formation of United State of Rajasthan but also for arrears of royalty for the period prior to the formation of the new State. He took steps to get the accounts and balance sheets of the plaintiff checked for the assessment of the correct amount of royalty. The following is a list of documents pertaining to the period 7-4-49 to 25-1-50 which have been proved in this case and which were received from the Director of Industries by the plaintiff from time to time.

Letter (Ex. 34) dated 7-5-49 asking for balance sheet and amount of royalty worked out on its basis.

Receipt (Ex. 6) dated 2-6-49 for rupees one lac paid as royalty.

Letter (Ex. 33) dated 17-6-49 acknowledging receipt of the royalty and asking for balance sheet.

Receipt (Ex. 7) dated 6-10-49 for Rs. 73419/-/6 on account of royalty.

Letter (Ex. 31) dated 10-10-49 sending officers, to verify the returns.

Letter (Ex. 30) dated 20-10-49 intimating that an officer will visit the mills to verify the accounts. Receipt (Ex. 8) dated 7-11-49 for Rs. 13,039/12/-on account of royalty.

Letter (Ex. 28) dated 5-12-49 pointing out some unauthorised deductions from the amount of profits which affected the amount of royalty.

13. During the same period another officer of the United State of Rajasthan namely the Commissioner Customs and Excise Jodhpur wrote letter (Ex. A 14) on 20-1-50 to the plaintiff informing it that the cloth in stock in the mills on 1-4-49 and manufactured thereafter was liable to be taxed with excise duty under the Rajasthan Excise Duties Ordinance 1949 and requiring it to pay the same.

14. Letter (Ex. 46) dated 8-2-50 from the plaintiff to the Secretary to Government, Department of Industries, Rajasthan, shows that as early as 1-11-1949 the plaintiff had represented to the Director, of Industries that in view of the agreement no excise duty could be recovered from the plaintiff. A similar representation was made to the Secretary to the Government in the Separate Revenue Department, United State of Rajasthan in letter dated. 24-12-49. Letter (Ex. 46) shows that the plaintiff had not received any reply from the Government. A reminder (Ex. 47) was sent on 28-2-1950. In. reply to these letters the Secretary to Government wrote in his letter Ex. 12 dated 29-3-50 to the plaintiff that the matter was under consideration of the Government, and that in the meantime it should continue to pay excise duty which will be refunded if so decided by the Government subsequently.

15. On behalf of the plaintiff it was urged that the United State of Rajasthan should be taken to have affirmed the agreement by its conduct in continuing to recover royalty. The other circumstances urged in this connection are (1) that customs duties which were recoverable under the Marwar Customs Act 1938 from 7-4-49 upto 3-8-49 and under the Rajasthan (Regulation of Customs Duties) Ordinance 1949 from. 4-8-49 onwards were not recovered from the plaintiff which act could only be related to

acting on this agreement, and (2) that there is a presumption in favour of affirmance in view of Article 6(2) of the Covenant. Reliance was placed on the following observations made in the *Dalmia Dadri Cement Co. Ltd.* case AIR 1958 SC 816:

'It was argued that Article VI of the Covenant would at least be valuable evidence from which affirmance of those rights could be inferred. That is so; but that inference must relate, to act or conduct of the new State, and that can only be after its formation.....If there were any acts of the new State which were equivocal in character, it would have been possible to hold in the light of Article VI of the Covenant that its intention was to affirm the concessions'.

16. The Privy Council decision in *Secretary of State v. Bai Rajbai*, AIR 1915 PC 59 was referred to in which it was laid down that an implied agreement by the new sovereign to recognise rights conferred upon the subjects by the old sovereign can be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights and express or implied election to respect them and be bound by them.

17. It was argued that the accredited agents of the State were acting on the agreement, that they were accepting the benefit under the agreement in the shape of royalty on behalf of the State and were exempting the plaintiff from import and export duty and having regard to the course of conduct pursued by the State the inference was irresistible that the State had chosen to affirm the agreement. It was contended that the acceptance of royalty by the State amounted to an election to abide by the contract and it was not open to the State to repudiate it now.

It was asserted that money having gone to the coffers of the State it was not open to it to say that the person by whose hand the money was received was not given authority to accept it specially when that hand happens to be the one so employed by the State usually to deal with such matters. It was said that the Director of Industries ostensibly dealt with the matter as an accredited agent of the State and his authority to do so was at no time repudiated by the State which must have been fully aware of the fact that royalty was being recovered from the plaintiff all along, and exemptions from import and export duty were being granted. It was averred that in case of any doubt the provision contained in Article 6 of the Covenant would tilt the balance in favour of the contract being affirmed by the State.

18. On behalf of the respondents it was contended that no amount of conduct of the subordinate officers of the Government could bind the State. Reliance was placed on *Thailendrakishore-das v. State of Madhya Pradesh*, AIR 1959 MP 27. It was argued that the State could only be bound by an affirmation made by the Raj Pramukh in the manner laid down in Sections 8 and 9 of the Rajasthan Administration (Amendment) Ordinance (No. 5) 1949. It was asserted that the doctrine of election has no application to the facts of the present case and that even if it is assumed that it was possible to infer the affirmation of the agreement by the conduct of the State the facts and circumstances proved in the present case do not warrant such an inference. The Privy Council decision in *Vajesinghji v. Secretary of State*, AIR 1924 PC 216 was referred to.

19. Before dealing with the respective contentions of the parties it would be better to consider the conduct of the State and its officers after 25-1-50. As has been mentioned above excise duties were recoverable under the Rajasthan (Regulation of

Customs Duties) Ordinance 1949 from 4-8-49. This Act remained in force upto 25-1-50. The evidence of the witnesses of the plaintiff shows that customs duties were not recovered from the plaintiff even after 25-1-50.

Reference has already been made above to letters Exs. 46 and 47 sent by the plaintiff to the Government on 8-2-50 and 28-2-50 respectively drawing their attention to the agreement and asking them to implement it and letter Ex. 12 dated 29-3-50 from the Government to the plaintiff intimating that the matter was under consideration and that in the meantime the plaintiff should continue to pay excise duty which will be refunded if so decided by the Government subsequently. On 15-5-50 the Secretary to the Government in the Separate Revenue Department wrote letter Ex. 44 to the plaintiff in reply to letter Ex. 46 dated 8-2-50 and subsequent reminder Ex. 47 dated 28-2-50--

'I am directed to say that, since the burden of the Excise Duty on cloth produced in your Mills ultimately falls under the present conditions on the consumer, who purchases the cloth, the Government of Rajasthan do not consider it necessary to exempt you from payment of the said duty. If circumstances change, you may approach the Government for relief according to the agreement.'

20. Ex. 43A dated 24-5-50 is a letter from the Director of Industries to the plaintiff enclosing a copy of letter Ex. 43B dated 19-9-49 from the Joint Secretary to the Government of India asking for a list of textile mills and powerloom factories whose production was exempt from excise duty. On 28-5-51 the Secretary to the Government in the Industries and Commerce Department wrote letter Ex. 45 to the plaintiff intimating that the question whether the Central Government was right in levying excise duty on cloth manufactured by the plaintiff before 1-4-50 was for the determination of the Central Government and the Government of Rajasthan had no locus standi in the matter.

21. On 16-4-52 the present suit was instituted. Prior to its institution two months notice as required under Section 80 C.P.C. was served.

22. It may be mentioned here that after the institution of the suit the Secretary to the Government in the Industries Department sent letter Ex. A4 dated 10th May 1952 to the plaintiff intimating that the rights and concessions granted to the Company and the liabilities and obligations accepted by the former Jodhpur State under the agreement appeared to be disproportionate to the public interest which the agreement was intended to serve and the position was further altered by coming into force of the [Constitution of India](#) and the Federal Financial Integration of the State with the Centre and informing the plaintiff that the whole agreement was being re-examined in the light of the altered situation and that he will be informed in due course 'as to which clauses of the agreement the Government of Rajasthan is prepared to honour and implement'.

23. Coming now to the respective contentions of the parties there can be no doubt that it was open to the State to accord recognition to the agreement either by declaration Or by conduct which could be regarded as amounting to affirmation. The authority for the proposition is provided by the decision of the Privy Council in AIR 1915 PC 59 and by the observations of their Lordships of the Supreme Court in the Dalmia Dadri Cement Co. Ltd. case, AIR 1958 SC 816, contained in para 23 of the A.I.R. report. Neither Section 8 nor Section 9 of the Rajasthan Administration

(Amendment) Ordinance No. 5 of 1949 can stand in the way. Section 8 corresponds to Article 166 of the Constitution and Section 9 to Article 299.

This is implicit in the observations of their Lordships of the Supreme Court in the Dadri Cement Co. Ltd. case, AIR 1958 SC 816. Independent authority is provided by the decisions of their Lordships of the Supreme Court in Lachmandas v. State of Bombay, AIR 1952 SC 235 and Chatterbhuj Vithaldas v, Moreshwar Parashram, AIR 1954 SC 236. In para 18 of the AIR report of the former case it was held that the provision of Article 166 is not mandatory in the sense that non-compliance with it could nullify or invalidate an executive action. In Chatterbhuj's case, AIR 1954 SC 236, their Lordships observed in para 41 of the AIR report that there was nothing to prevent ratification of a contract which does not comply with the requirement of Article 300. Ratification I under Section 197 of the Contract Act may be either express or implied: see Illustration (b) to that section.

24. Coming now to the doctrine of election I am not aware that it has been applied to a case of the present nature. According to Maitland the doctrine may be stated thus: that he who accepts benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it. Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election. A person is entitled to be allowed time to make an election. Under Section 35 of the Transfer of Property Act one year's time from the date of the transfer is allowed to signify the intention to confirm or to dissent from the transfer and upon expiration of that period if the other party requires him to make his election and he fails to do so then alone the person is deemed to have elected to confirm the transfer.

So long as a conscious election is not made it is as open to the person accepting the benefit to relinquish it. Even if the doctrine of election had been applicable to the facts of the present case it cannot be said that the State elected to abide by the agreement from the mere acceptance of the royalty pending consideration whether or not to affirm it.

25. What has to be determined is whether on the facts and circumstances appearing from the evidence on record it can be said that the United State of Rajasthan affirmed the agreement. I am firmly of the opinion that no such inference can be drawn. The State did not make up its mind whether or not to abide by the agreement and pending final decision the agreement was acted upon provisionally. The agreement was not repudiated till the written statement in the present suit was filed.

26. In Vajesinghji's case, AIR 1924 PC 216, the plaintiffs were proprietors of certain lands which formed part of the domain of Scindia of Gwalior till 1860 when the territory ceded to the British Government under a treaty under which the latter undertook to renew all leases in favour of its new subjects on the same terms and conditions on which they held them under the Scindia. Leases were granted in favour of the plaintiffs by the officers of the Government which were renewed from time to time. In 1860 the Government came to a decision that the plaintiffs were not entitled to hereditary rights but might be continued as lease-holders so long as they behaved themselves.

The plaintiffs made several representations which were rejected. Ultimately they brought a suit for a declaration that they were proprietors of the land and were not bound to accept a lease of the same in the terms offered to them by the Government in 1907. In support of their claim it was contended before the Privy Council that the Government had recognised certain free grants which had been made in the past by the plaintiffs. Their Lordships observed:

'The wish not to disturb persons whose tenure had been, de facto, free was a generous policy. But to infer from this generosity that the Government was admitting that the grants had originally been properly made and that from that admission flowed the further admission that the Naiks were true proprietors is to make a mere inference over-ride a direct statement.'

27. The United State of Rajasthan ceased to exist on 25-1-50. The liabilities and obligations of the United State of Rajasthan became the liabilities of the Part B State of Rajasthan and of the Union of India under Article 295 of the Constitution. As the United State of Rajasthan did not affirm the agreement the liabilities and obligations under it were not transferred to the State of Rajasthan and the Union of India under Article 295(1)(b).

28. It was contended on behalf of the plaintiff that recognition of the agreement can be inferred from letter Ex. 44 dated 15th May 1950 from the Secretary to the Government of Rajasthan in the Separate Revenue Department to the plaintiff. It was stated in this letter that the Government did not consider that the plaintiff was entitled to exemption from excise duty on cloth as the burden of it fell on the consumer and that if the circumstances changed the plaintiff might approach the Government for relief in accordance with the agreement. As is clear from letter Ex. A4 dated 10th May 1952 from the Secretary to the Government of Rajasthan in the Industries Department the State was trying to honour and implement the agreement as far as it considered reasonable and within its power.

No intention to abide by the whole agreement can be inferred from letter Ex. 14. Further as has been mentioned above the Raj Pramukh of Rajasthan entered into an agreement Ex. 77 on 25-2-50 with the President of India under Articles 278, 291, 295 and 306 of the Constitution and in pursuance of the agreement the Central Excises & Salt Act 1944 was extended to Rajasthan with effect from 1-4-50. On 15th May 1950 the State of Rajasthan was no longer competent to recognise an agreement involving exception from excise duty. Only the Union of India could have recognised an agreement of this nature on 15th May 1950 and that too with the previous approval of Parliament. But any law of Parliament recognising such an agreement can be altered at any time by subsequent legislation either by the same Parliament or by its successor.

29. It was also argued on behalf of the respondents that even if the United State of Rajasthan had affirmed the agreement it could not be held to be bound by it as future executive action of the Government cannot be fettered. Reliance was placed on *Rederiaktiebolaget Amphitrite v. The King*, 1921-3 KB 500 which was followed by the Privy Council in *Antonio Buttigieg v. Stephen H. Cross*, AIR 1947 PC 29. It was further contended that for the same reason the agreement of this nature cannot be held to bind the successors of the United State of Rajasthan. In the English case it was observed:

'My main reason for so thinking is that it is not competent for the Government by enforceable contract to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State'.

The undertaking given which was violated was that a particular ship will not be detained. In the case which came up before the Privy Council the undertaking given was that the club would be kept open throughout the war. It was violated by declaring the club to be out of bounds for troops, for whose exclusive use it was established. It appears to me that these decisions are applicable to the facts of the present case.

An undertaking to indemnify against future taxation cannot therefore be enforced against the State, if the State itself chooses not to abide by it. For its future executive action must be determined by the needs of the community when the question arises and its freedom of action in matters which concern the welfare of the State cannot be hampered by contract. The power to exempt from tax is sovereign legislative power. The law is already well established that future legislative action cannot be fettered. I may refer to the decision of the Privy Council in *Jagannath Baksh v. United Provinces*, AIR 1946 PC 127 and to a Full Bench decision of this Court in *Associated Stone Industries (Kotah) Ltd. v. the Union of India*, ILR (1958) 8 Raj 700.

30. Another line of reasoning put forward on behalf of the plaintiff was that the agreement amounted to a legislative contract as the Ruler of Jodhpur was an absolute monarch and his word was law. Reliance was placed on the observations made by their Lordships of the Supreme Court in *Ameer-un-Nisa Begum v. Mahaboob Begum*, AIR 1955 SC 352 in paras 15 and 16 of the AIR report. It was argued that the special law contained in this legislative contract was continued in the United State of Rajasthan by Section 3 of the Rajasthan Administration Ordinance No. 1 of 1949 but was not repealed by the Rajasthan Excise Duties Ordinance No. 25 of 1949 or by the Finance Act, 1950 which extended the Central Excises and Salt Act, 1944 to Rajasthan and repealed all the existing corresponding laws in force in Rajasthan, the rule of construction being that general statutes should be interpreted so as not to interfere with the rights created under special laws. Reliance was placed on the statement of the law in *Maxwell's Interpretation of Statutes*, 10th Edition, pages 176 and 180, on the observations in *Blackpool Corporation v. Starr Estate Co. Ltd.*, 1922-1 AC 27 and on some other English, American and Indian decisions.

31. The contention on behalf of the respondents was that the agreement was not intended to be a law, that it was not in the form in which laws were enacted in Jodhpur State, that it was not promulgated as a law, that it was not signed by the Ruler himself, but was signed by the P. W. D. Minister on his behalf, that it was termed as an agreement and was executed by two parties and that special laws were enacted by legislatures only or by the sovereign alone. Reliance was placed on *Harla v. State of Rajasthan*, AIR 1951 SC 467 and *Somathmal v. State of Rajasthan*, 1954 Raj LW 43: (AIR 1954 Raj 162), to show that if the agreement purported to be a special law it was invalid for want of publication,

Further it was argued that even if it was a special law it was repealed by the provisions of the Rajasthan Excise Duties Ordinance 1949 and by the Finance Act 1950 which extended the Central Excise and Salt Act 1944 to Rajasthan and repealed all the corresponding laws in force in Rajasthan.

32. AIR 1951 SC 467 was a case of a penal statute and 1954 Raj LW 43: (AIR 1954 Raj 162) was a case of a fiscal statute. The considerations which make the publication of such enactments necessary in such cases are not applicable to a legislative contract and I do not think that non-publication by itself is sufficient to invalidate such a contract as special law. Assuming however that the agreement was a special law I think that it was repealed by the Finance Act, 1950 even if it was not repealed by the Rajasthan Excise Duties Ordinance 1949. Section 3 of the Rajasthan Excise Duties Ordinance 1949 provided for levying duties of excise on all excisable goods produced or manufactured in Rajasthan whether in stock on the 1st April 1949 or thereafter produced or manufactured at rates set forth in the First Schedule.

Section 30 provided for the repeal of all laws dealing with matters covered by the Ordinance, in force at the commencement thereof in any part of Rajasthan. Before the above Ordinance was promulgated the Indian States Finances Enquiry Committee had submitted its report to the Government of India, At page 52 of the Annexure to Part I of the Report the following observation has been made by the Committee:

'In some of the covenanting States of Rajasthan Union a system of 'Royalties' is in force in connection with certain industrial enterprises; similar arrangement may exist in other States also. These, in so far as the Royalties are computed by reference to the profits of such concerns, should be dealt with as follows:

'Royalties' computed by reference to income or profits are of the nature of taxes on income and so cannot continue to be imposed by the States after federal financial integration becomes effective. After the prescribed date, they will be substituted by income-tax in the ordinary sense. The bearing of this upon any pre-existing concessions in the matter of 'income-tax' will require careful consideration, for it may well be that the conversion of such Royalties into 'federal' income-tax may render the continuance of any of the pre-existing concessions superfluous.

Any profit-sharing arrangement between States and particular industrial concerns, after payment of 'federal' taxes on income, will of course remain unaffected by what has been said above.'

33. At page 9 of Part II of the Report it is mentioned that in most States certain individuals and corporations enjoy immunities and privileges of which most important relate to taxes on income. They proceeded to recommend--

'Our recommendations as regards the future treatment of the privileges and immunities connected with taxes on income are contained in the Annexure appended to Part I of our Report; all other taxation privileges should be dealt with along similar lines. The broad principles which, we recommend, should be observed in this connection, are as follows:

(ii) Any special financial privileges and immunities (affecting 'federal' revenues) conferred by the States upon other individuals and corporations should ordinarily be continued on the same terms by the Centre, subject to a maximum period of ten (or fifteen) years, and subject also to limiting in other ways any such concessions as may be extravagant or against the public interest. It goes without saying that any general concessions which the Centre itself may accord to persons and corporations in the Provinces should of course be available also on similar terms to persons and corporations in States, if they should be more favourable than those (if any) already

accorded by the States themselves.'

34. At page 11 central excise duties have been dealt with. It was recommended with regard to royalties based on production that they must be regarded as excise duty of a 'federal' nature, which could not be imposed for the benefit of the State after the prescribed date and must therefore be terminated with effect from that date and replaced by central excise duties levied by the Centre throughout India on such articles.

35. All the recommendations made by the Indian States Finances Enquiry Committee were accepted by the President and the Raj Pramukh in Agreement Ex. 77 dated 25-2-50 entered into under Articles 278, 291, 295 and 306 of the Constitution.

36. The rule that general provisions will not abrogate special provisions cannot be pressed too far. A general statute may repeal a particular statute. There may be facts and circumstances showing that the legislature intended to repeal the special Act. Each case is to be decided on its own facts and circumstances.

37. As has been pointed out above the Indian States Finances Enquiry Committee had submitted its report to the Government of India before the Rajasthan Excise Duties Ordinance 1949 was brought into force. In this Report a recommendation had been made that concessions from taxation should ordinarily be continued on the same terms by the Centre subject to a maximum period of 10 or 15 years subject also to limiting in other ways any such concessions as may be extravagant or against the public interest

The Government of the United State of Rajasthan could not have been unaware of its recommendation, since it was directly concerned with them and before making them enquiries must have been made by the Committee from it. In spite of this the language used in Sections 3 and 30 of the Ordinance was very wide. Section 3 provided for levying duties of excise on all excisable goods manufactured in Rajasthan and Section 30 provided for the repeal of all laws dealing with matters covered by the Ordinance. Now the grant of exemption from excise duty is a matter covered by the Ordinance. If the agreement had the force of law then it was repealed by Section 30 of the Ordinance.

38. After the Excise Duties Ordinance came the Finance Act of 1950. It was enacted by Parliament which was fully aware of the Report of the Indian States Finances Enquiry Committee. Some of the recommendations of this Committee were adopted in drafting the Constitution. Under Section 11 of the Finance Act 1950 the Central Excises and Salt Act 1944 was extended to Rajasthan and under Section 13(2) all the existing corresponding laws in force in Rajasthan on that day were repealed. The explicit language used in Section 13(2) coupled with the fact that Parliament must have been aware of the recommendations made by the Indian States Finances Enquiry Committee leaves no doubt in our mind that it was the intention of Parliament to repeal all laws granting privileges and immunities from excise duties.

Under Section 37(2)(xvii) of the Central Excises and Salt Act, 1944, the Central Government has power to make rules to exempt any goods from the whole or any part of the duty imposed by this Act. It is open to the Central Government under the provisions of the Act to carry out the recommendations of the Indian States Finances Enquiry Committee namely that special financial privileges and immunities affecting

the federal revenue conferred by the States should ordinarily be continued on the same terms by the Centre subject to a maximum period of 10 or 15 years provided such concessions are not extravagant or against public interest. If the agreement Ex. 1 amounted to a special law it was not repealed by the Rajasthan Excise Duties Ordinance 1949. It was certainly repealed by the Finance Act of 1950.

39. So far as the State of Rajasthan is concerned the agreement was frustrated within the meaning of Section 56 of the Contract Act as the consideration for it namely royalty at 7 1/2 per cent of the net profits became irrecoverable by it when the Finance Act, 1950 was passed extending the Income Tax Act to Rajasthan. For this royalty was a tax on income. That this royalty was intended to be a quid pro quo for a number of concessions cannot alter its essential nature as a tax on income which the Union alone became competent to levy with effect from 1-4-50.

It may be mentioned here that it was competent for the State to continue collecting this royalty until the Finance Act 1950 came into force by virtue of the provision of Article 277 of the Constitution. As soon as the income tax was imposed in the territories of Rajasthan by the Finance Act, 1950 made by Parliament it was no longer open to the State to collect this royalty. So far as the State is concerned therefore the consideration for the agreement became unlawful with effect from 1-4-50 and the contract was frustrated under Section 56 of the Contract Act. It is therefore not open to the plaintiff to enforce the indemnity Clause contained in the agreement even if the agreement amounted to a special law and the indemnity Clause contained in it was not affected by the Rajasthan Excise Duties Ordinance 1949 and the Finance Act, 1950.

40. The learned District Judge stated in his judgment that the Report of the Indian States Finances Enquiry Committee acquired the force of law when its recommendations were accepted by the President and the Raj Pramukh under agreement Ex. 77 dated 25-2-50. This is certainly erroneous. Neither the report nor the agreement entered into between the President and the Raj Pramukh has the force of law. The courts will take cognizance of the agreement so far as it relates to matters specified in Articles 278, 291, 295 and 306 of the Constitution.

41. I am also unable to agree with the finding of the learned District Judge that the present suit for the refund or reimbursement of the excise duty is not maintainable as the plaintiff had collected the same from consumers over and above the ex-mill price of the cloth. It was held by the Federal Court in *Madras Province v. Boddu Paidanna and Sons*, AIR 1942 FC 33 and by the Privy Council in *Governed General in Council v. Madras Province*, AIR 1945 PC 98 that excise duty is a tax on the manufacturer. Both these cases were cited with approval by their Lordships of the Supreme Court in *Ramkrishna Ramnath v. Secy. Municipal Committee Kamptee* AIR 1950 SC 11.

No doubt excise duty is an indirect tax which is ultimately intended to fall on the consumer. But it is recoverable from the manufacturer even if the manufacturer is unable to recover it from the consumer. By Dhoties (Additional Excise Duty) Act No. 39 of 1953 additional excise duty was levied retrospectively. It was contended before this Court in the *Mewar Textile Mills Ltd., Bhilwara v. Union of India*, ILR (1935) Rai 832: ((S) AIR 1955 Raj 114) that an excise tax could not be levied retrospectively as it must have the potentiality of being shifted on the consumer.

This contention was repelled on the ground that excise duty is a tax imposed on the

manufacturer. The power to fix maximum price of cloth under Section 3 of the Essential Supplies Act was delegated to the Textile Commissioner, Maximum prices were fixed by him taking into account the cost of production leaving a reasonable margin of profit. When excise duty was subsequently imposed the manufacturer was allowed to add the amount of excise duty to the price already fixed in order to arrive at the new maximum price.

This was merely a method of setting the maximum price. It could not have the result of making the manufacturer the agent of the Union of India for purposes of collecting excise duty from the consumers. The learned District Judge therefore erred in holding that the present suit was not maintainable as the plaintiff had already collected the excise duty on cloth sold by him from the consumers.

42. Another finding of the learned District Judge with which I am unable to agree is that the contract has become void under Article 14 of the Constitution. The cases on the subject have been enumerated by their Lordships of the Supreme Court in *Ram Krishan Dalmia v. S. R. Tendolkar*, AIR 1958 SC 538. Firstly the plaintiff mills can be treated to be a class by itself on account of its history, the adverse climatic conditions, the non-availability of technical labour at Pali etc. Secondly neither the State of Rajasthan nor the Union of India can be considered to be a person aggrieved who is entitled to complain of a violation of a fundamental right.

43. Another argument which was raised on behalf of the plaintiff was that a liability arising under Article 295 of the Constitution becomes a part of the Constitution and cannot be done away with except by legislation which should be passed as if it were an amendment of the Constitution. In view of my finding above this question does not arise for consideration in this case. A similar argument was repelled by a Full Bench of this Court in ILR (1958) 8 Raj 700.

44. To sum up, my findings are:

(1) Treating the agreement of 17-4-41 as a simple contract the liability under it does not devolve on the State of Rajasthan or the Union of India under Article 295 of the Constitution as the United State of Rajasthan which was the successor of the Jodhpur state which entered into the agreement, did not affirm it. Even if the United State of Rajasthan had affirmed it the agreement would not be binding on the State of Rajasthan or the Union of India as it fetters future executive and legislative action of sovereign bodies. Further even if the agreement had been affirmed by the United State of Rajasthan and the liability to indemnify had devolved on the State of Rajasthan the agreement would have become frustrated within the meaning of Section 56, Contract Act, on the coming into force of the Finance Act, 1950, because the consideration for the agreement namely payment of 7 1/2 per cent on the net profits became irrecoverable by it in view of that statute and the provisions of the Constitution.

(2) Assuming the agreement to be special law it was repealed by Section 30 of the Rajasthan Excise Duties Ordinance, 1949, and by Section 13 of the Finance Act.

45. In every view of the case therefore I find that the agreement dated 17-4-41 is not enforceable against the respondents. I accordingly confirm the decree of the court below and dismiss the appeal with costs.

Bapna Actg. C.J.

46. I agree that this appeal should be dismissed, but I would like to add a few words on two important points raised by learned counsel for the appellant Company.

47. The main contention raised by learned counsel for the appellant was that the agreement Ex. 1 was a piece of legislation, the validity whereof had been preserved by Section 3 of the Rajasthan Administrative Ordinance, 1949 and Article 372 of the [Constitution of India](#). This argument was raised by learned counsel as a second string to the bow in view of certain difficulties to prove that the agreement had been acted upon by the United State of Rajasthan. Learned counsel relied on certain American authorities for the contention that the private agreement could also take the shape of law.

All those cases, however, were of the kind where there was an agreement between the local authority and a private person which was subsequently incorporated into an enactment. Document Ex. 1 cannot by any stretch of imagination be considered to be a piece of legislation. It was drafted as an agreement and executed as an agreement. It was signed by agents of two parties to the agreement and attested by witnesses. The document is an example of reciprocal promises. While the State agreed to do certain things and not to do others, the other party to the document also agreed to do certain things and not to do others.

We have been referred to a large number of enactments enacted by His Highness the Maharaja of Jodhpur as sovereign legislative authority in the State which appear in an entirely different form than the present document. There is no doubt in my mind that the document is a contract between the two parties and does not amount to a piece of legislation. I agree with the reasoning given by my learned brother that even if this were to be considered a piece of legislation so far as certain clauses relating to exemption from excise duties were concerned, it has been repealed by subsequent legislation referred to by my learned brother.

48. The next contention of learned counsel for the appellant was that the agreement had been acted upon by the United State of Rajasthan. The Rajasthan State was formed with effect from 7-4-1949. Letters Ex. 4 dated 5-7-47, Ex. 33 dated 17-6-49, Ex. 31 dated 10-10-49, and Ex. 30 dated 20-10-49, Ex. 28 dated 5-12-49 and Ex. 44 dated 15-5-50 were relied upon. It may be mentioned that prior to its merger, the Jodhpur State had followed the agreement and did not charge excise duties from the Mills. The merger took place on 7-4-1949. The Jodhpur State had its own Director of Industries and Commerce and letters Ex. 34, Ex. 33, Ex. 31 and Ex. 30 as also Ex. 28 are all from the Director, Industries and Commerce Department of Jodhpur.

It may be that the United State of Rajasthan had not been by that time, able to establish the integrated department of Industries and Commerce and on that account, correspondence etc. had been entered into by the Director, Industries and Commerce Department, Jodhpur. This officer of the Jodhpur State may have thought of continuing the agreement entered into by the former Jodhpur State. None of these letters are by any officer who could represent the State of Rajasthan in its political entity. Similarly, receipts Ex. 6, Ex. 7 and Ex. 8 are from the Director of Industries and Commerce Department, Jodhpur.

It was obviously not possible to replace all officers of the former covenanting State

and organise an integrated department on the date of integration so that the executive head of the State could have before him the overall picture of the situation. Therefore, what was done by the Director of Industries and Commerce Department, Jodhpur cannot have the effect of attributing affirmance of the agreement by the United State of Rajasthan, even if some money by way of royalty may have been accepted by him.

The United State of Rajasthan could not be aware of the various commitments that may have been made by the covenanting States in various spheres of activities. On the date the new State was formed and unless every one of such commitments came to be noticed by competent authorities, certain letters which may have been issued by subordinate officers would not have the effect of adoption of such commitments so as to bind the State.

49. Ex. A-14 dated 20-1-1950 is a letter from the Commissioner, Excise and Customs, Jodhpur to the Mills in reply to a communication by the Milk to the Commissioner of Customs and Excise, United State of Rajasthan Head Quarters Udaipur and the Mills are informed by this letter that they are liable to pay the excise duty in accordance with the provisions of Rajasthan Excise Duties Ordinance, 1949 (in force from 4-8-1949) and should, therefore, declare their stocks.

A letter by the Mills Ex. 46 dated 8-2-50 to the Secretary, Department of Industries, Rajasthan, Jaipur refers to the demand by the Deputy Commissioner, Customs and Excise, Jodhpur (the reference is to the latter's communication of 28-1-1950 which may perhaps be only a reminder of his letter Ex. A-14 of 20-1-1950) and urges that the excise duty was not leviable in accordance with the agreement between the Jodhpur State and the Mills. A copy of this letter was sent to four officers including the Secretary, Separate Revenue Department, Rajasthan, Jaipur. The two secretaries seem to have been dealing with the matter separately.

Ex. 12 is the interim reply by the Secretary to the Government, Industries and Commerce Department, Rajasthan dated 29-3-50 informing the Mills that the matter was under consideration of the Government and that in the meantime the Mills should continue to pay excise duty and will be eventually refunded, if so decided. The same secretary gave the final reply Ex. A-4 dated 10-5-52. In second para of that letter, he said that he was directed to say,

'that the rights and concessions granted to the Company and the liabilities and obligations accepted by the former Jodhpur State under the agreement are extraordinary, unconscionable and disproportionate to the public interest which the agreement was intended to serve'.

He added that, Clause 6 of the agreement (and this is the Clause relating to excise duties) was amongst such provisions of the agreement which were extravagant, unconscionable and against public interest. He regretted that the representation of the Mills could not be acceded to. The Secretary further informed the Mills that the whole agreement was being examined in the light of the observations made in the said letter and that the Mills will be informed in due course as to which Clause of the agreement, the Government of Rajasthan was prepared to honour and implement.

50. The other secretary to the Separate Revenue Department in the meanwhile wrote to the Mills on 1-5-50 a letter (Ex. 44) which has been strongly relied upon by the

appellant as indicative of the acceptance of the agreement by the Government of Rajasthan. The letter is as follows:

'With reference to the correspondence resting with your letter No. 50/1616/G, 203 dated 28-2-50, on the subject mentioned above (Excise Duty on cloth), I am directed to say that, since the burden of the Excise Duty on cloth produced in your Mills ultimately falls under the present conditions on the consumer, who purchases the cloth, the Government of Rajasthan do not consider it necessary to exempt you from payment of the said duty. If circumstances change, you may approach the Government for relief according to the agreement.'

51. The letter if analysed, first of all intimates the refusal of the Government to exempt the Mills from payment of Excise Duty and secondly an advice is given that the Mills may approach the Government in future, if circumstances change for relief according to the agreement.

The refusal to exempt from payment of excise duty obviously leads to the conclusion that the Government of United State of Rajasthan was not prepared to accept the agreement in respect of the exemption Clause and it is immaterial that the reason given for coming to that conclusion is puerile. The second part is only an advice as to what the Mills may do and no committal on the part of the Government can be read into that advice. What the Government will do when the Mills approach the Government for relief and under what circumstances, the Mills could approach are left uncertain in the document.

52. This letter which is the sheet-anchor of the case of the appellant is further not a document of such authenticity as may bind the United State of Rajasthan. In *Ghaiomal and Sons v. State of Delhi*, AIR 1959 SC 65, their Lordships of the Supreme Court had the occasion to consider the question whether a particular letter reproduced below could be read as order of the Chief Commissioner. The letter was as follows;

'From

Shri M.L. Batra, M. A. P. C. S.,

Under-Secretary Finance (Expenditure),

to Government Delhi State.

To,

Shri Dalip Singh, M. A. I. R. S.,

Commissioner of Excise,

Delhi Gate, Delhi.

Subject:-- Grant of L-2 License.

Sir,

With reference to your letter No. 295/C/54 dated 31-8-1954 on the above subject I am directed to say that the Chief Commissioner is pleased to approve under Rule 5.1 of Delhi Excise Manual Vol. II the grant of L-2 license to Messrs. Gainda Mall Hem Raj, New Delhi, in place of the L-2 license surrendered by Messrs. Army and Navy Storey, New Delhi. Necessary license may kindly be issued to the party concerned under intimation to this Secretariate.

Yours faithfully,

sd/- M. L. Batra,

Under Secretary (Exp.)

to Govt., Delhi State.'

Their Lordships had several criticisms against this letter, some of which are relevant and applicable to Ex. 44 also. The observations are:

'In the third place, the writer quite candidly states that he had been 'directed to say' something -- by whom, it is not stated, this makes it quite clear that this document is not the order of the Chief Commissioner, but only purports to be a communication -- at the direction of some unknown person -- of the order which the Chief Commissioner had made Finally, the document does not purport to have been authenticated in the form in which authentication is usually made. There is no statement at the end of the letter that it has been written by order of the Chief Commissioner.'

53. Under the [Constitution of India](#), the Raj Pramukh was then the head of the State and all executive action of the Government was to be expressed in the name of the Raj Pramukh under Article 168 of the Constitution. Unless a matter of this kind was expressed in the name of the Raj Pramukh Or the action proved to have been taken by the Raj Pramukh, it could not bind the State of Rajasthan. The acceptance of the agreement was required to be made in the name of the Raj Pramukh before it could bind the State, There is no proof either that the Raj Pramukh took any action in the matter. The letter, Ex. 44 did not amount to an acceptance of the implications of the agreement Ex. 1 by the United State of Rajasthan.

54. I agree with the other reasons given by my learned brother that in any view of the case, this appeal cannot succeed.

By the Court:

55. The appeal is dismissed with costs.